IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-744

UNITED STATES OF AMERICA,
Petitioner,

v.

CHARLES TIMMRECK,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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For the reasons stated below, Respondent requests this Court to deny a writ of certiorari in this cause.

COUNTER-STATEMENT OF THE QUESTION

Where, at the time an accused offers a guilty plea, the trial judge fails personally to advise him on the record that a custodial sentence on the charge to which he is pleading guilty must include a special parole term of not less than three (3) years in addition to whatever custodial sentence defendant receives, the defendant has not been fully or accurately advised of the consequences of his plea, in violation of F R Crim P 11, and it is error to deny his motion, brought pursuant to 28 USC § 2255, to vacate that plea.

COUNTER-STATEMENT OF THE CASE

1. On May 24, 1974, Respondent Charles Timmreck pled guilty in the United States District Court for the Eastern District of Michigan to conspiracy to distribute a controlled substance in violation of 21 USC § 846. On September 19, 1974, Mr. Timmreck was sentenced to ten (10) years imprisonment, a five thousand ($5,000.00) dollar committed fine and a special parole term of five (5) years.

On September 13, 1976, pursuant to the provisions of 28 USC § 2255, Mr. Timmreck filed an Amended Motion to Vacate Guilty Plea, alleging that his plea had been accepted in violation of F R Crim P 11 for the reason that the district judge had failed to advise him of the mandatory special parole provisions of 21 USC § 841(b) accompanying any prison sentence for violation of 21 USC § 846. After hearing and oral argument, the district judge on December 3, 1976, entered an Opinion and Order denying Mr. Timmreck's motion. After timely

appeal, the United States Court of Appeals for the Sixth Circuit on June 12, 1978, reversed the judgment of the district court and remanded the cause with instructions to vacate the sentence entered upon the guilty plea and to allow Mr. Timmreck to plead anew.

2. At the time Respondent appeared in court to offer his guilty plea in this case, he was questioned by the district judge as to his understanding of certain of the rights he was waiving. The judge stressed that "what I want to get at and be sure of is that you fully understand what you are doing" (T-4).* He questioned Mr. Timmreck and his attorney as to Mr. Timmreck's understanding of his rights (T-6-7), and he asked Mr. Timmreck about his understanding of the possible punishment, as to which the following colloquy occurred:

> THE COURT: Now, if I accept your plea of guilty, Mr. Timmereck [sic], *do you know what the possible consequences of a plea of guilty to Court I of this Indictment could be in terms of punishment*?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: *Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. Have you been told that*?
>
> THE DEFENDANT: *I have now, yes.*

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* Page references preceded by 'T' refer to pages of the May 24, 1974, guilty plea transcript; page references preceded by 'H' refer to pages of the September 8, 1976, hearing on Respondent's Motion to Vacate.

THE COURT: *Now you know?*

THE DEFENDANT: *Yes, sir.*

THE COURT: I want you to be thoroughly advised as to that, because if you wish, knowing now that it's possible that if I accept your plea of guilty, that that's what could happen in this case. (T-7-8)[1] (emphasis added)

At the conclusion of the hearing, without mention of additional plea consequences in general or the mandatory special parole provisions of 21 USC § 841(b) in particular, the court accepted Mr. Timmreck's plea (T-16).

REASONS FOR DENYING THE WRIT

1. The standard applied by the Court of Appeals in this case is more likely than that proposed by the government to result in fair, uniform and readily administrable application of Rule 11.

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[1] Toward the end of the plea hearing, the court asked Mr. Timmreck's counsel whether he was of the opinion that Mr. Timmreck "knows full well the consequences of a guilty plea might be", to which counsel replied, "That's correct." (T-15-16). At the September 8, 1976, hearing on Respondent's Motion to Vacate the court asked counsel whether he had discussed with Mr. Timmreck the provisons of the special parole term. Although agreeing with the court that it was not a part of his custom not to explain to a client the sentencing implications of a guilty plea, counsel stated that he could not recollect whether he had expressly advised Mr. Timmreck of the special parole requirements involved here (H-3-8).

Because the vast majority of federal indictments are resolved by pleas of guilty, cf. *McCarthy* v *United States*, 394 US 459, 463, 89 SCt 1166, 22 LEd2d 418, 424 (1969) at n 7, the "fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all" accused persons. Notes of the Advisory Committee on 1966 Amendments to F R Crim P. Procedures which do not insure meticulous compliance with Rule 11 threaten the requirement of thorough, knowing voluntariness and consequently jeopardize the integrity of the adversary process itself.

Requiring a § 2255 petitioner to show prejudice is unsound. While a strict compliance standard may sometimes require the granting of relief in a case where a plea has been "truly" voluntary, it is the only way of insuring that relief is granted in all cases where it was not. Moreover, a strict compliance standard guards against unequal application of the more subjective standard urged by the government. As Judge Boreman noted for the Fourth Circuit in *Paige* v *United States*, 443 F2d 781, 783 (4th Cir 1971):

> . . . there is no way by which the effect of the court's misleading statement upon the voluntariness of Paige's guilty plea could be determined. Whether Paige would have elected to plead not guilty and put the government to proof of his guilt had he known the full consequences of pleading guilty to a second narcotics offense is a matter of pure speculation.

See also *McCarthy, supra*, 394 US at 465, 22 LEd2d at 425; *Yazbeck* v *United States*, 524 F2d 641, 643-644 (1st Cir 1975); *Bell* v *United States*, 521 F2d 713, 716-717 (4th Cir 1975) (Widener, J., concurring and dissenting).

Carrying the burden of showing prejudice would also be "an almost impossible task". *United States* v *Carper*, 116 F Supp 817, 820 (DDC 1953) (re violation of F R Crim P 6(d)). Accused persons plead guilty for many reasons, some of them bizarre and irrational even to judges and counsel regularly involved in the criminal process. It is not unreasonable to assume that many defendants calculate their likely sentence as a percentage of their total exposure. In some cases, an accused would in fact have decided to proceed to trial if he or she had known the additional possible prison time faced for violation of special parole, and in most of those cases, the accused will be unable to establish that lack of knowledge of that additional exposure was a substantial circumstance in the decision to plead guilty.

In addition, then-District Judge, now-Circuit Judge Tamm, noted in *Carper, supra*, that a requirement of showing prejudice would also

> undermine the purpose, effectiveness and value of the Criminal Rules by judicial legislation which, in effect, would be saying that the Rules do not mean what they clearly and unequivocally state. *Id.*, 116 F Supp at 819.

It would also make more difficult the achievement of uniform federal criminal procedure. *Id.*, 116 F Supp at 821.

The test applied here should ultimately further rather than hinder the objective of finality and produce less rather than more litigation. By adhering to an objective standard, lower courts will be relieved of time-consuming hearings on the question of prejudice. Counsel for both parties will more readily be able to determine whether an asserted violation is meritorious. Where an objective test is applied, government attorneys will also have an incentive to be fully attentive at guilty plea proceedings and to advise the court of any failures or omissions in the guilty plea record. Cf. *United States* v *Timmreck, supra*, 577 F2d at 377.

At a minimum, resolution of this question by this Court should be deferred until sufficient time has elapsed to determine which test has had a greater effect in producing uniform application of the Rules and in reducing the number of challenges to guilty pleas.

2. The factual record in this case is inadequate to provide this Court with an appropriate case for resolving the conflicts among the circuits. No record was made below of the prejudice suffered by Mr. Timmreck as a result of the trial judge's failure to advise him of the mandatory special parole term. No record was made below as to the reasons for the time lapse between the time of sentencing and the time of filing the § 2255 petition. No record was made concerning the likelihood or unlikelihood that Mr. Timmreck would have withdrawn his plea of guilty had he been advised of the mandatory special parole term by the trial judge.

No record was made concerning the government's present ability to proceed with reprosecution in this case.[2]

CONCLUSION

For all the reasons stated above, the writ should be denied.

Respectfully submitted,

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[2] The government did not claim below that its ability to proceed with reprosecution would be impaired if the plea were set aside.

Much of the government's evidence against Mr. Timmreck and his co-defendants was obtained as a result of court-approved electronic surveillance, cf. *United States* v *Schebergen*, 353 F Supp 932 (ED Mich 1973) [Mr. Schebergen was the first-named defendant in this cause], and it is highly unlikely they would be unable to proceed if *certiorari* is denied or the decision of the Court of Appeals is affirmed.